

**BEFORE THE SECRETARY OF STATE  
STATE OF COLORADO**

**CASE NO. OS 2002-025 and OS 2002-029**

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**AGENCY DECISION**

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**IN THE MATTER OF THE COMPLAINTS FILED BY CHARLES W. CARTER  
REGARDING ALLEGED VIOLATIONS OF THE FAIR CAMPAIGN PRACTICES ACT ON  
THE PART OF THE COMMITTEE TO ELECT ROB FAIRBANK AND THE FUND FOR  
COLORADO'S FUTURE**

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This matter arises from complaints filed with the Colorado Secretary of State on October 22 and 29, 2002, by Complainant Charles W. Carter. The complaints allege violations of the Fair Campaign Practices Act, Sections 1-45-101 to 118, C.R.S. (2002) ("the Act"). The Secretary of State transmitted the complaints to the Colorado Division of Administrative Hearings for the purpose of conducting hearings pursuant to Section 1-45-111(2)(a), C.R.S. (2002), of the Act.

Hearing was held on February 10, 2003, before Administrative Law Judge Nancy Connick. Complainant appeared *pro se*. Rob Fairbank appeared and was represented by Richard A. Westfall, Hale Hackstaff Tymkovich, LLP. At hearing, however, it became clear that all complaints were directed against the Committee to Elect Rob Fairbank or the Fund for Colorado's Future and not against Rob Fairbank as an individual. The Administrative Law Judge has therefore amended the caption of this proceeding to more accurately reflect the nature of the complaints.<sup>1</sup> The Administrative Law Judge issues this Agency Decision pursuant to Sections 1-45-111(2)(a) and 24-4-105(14)(a), C.R.S. (2002).

Although Complainant originally filed two separate complaints and thus two separate proceedings [OS 2002-025 and OS 2002-029] were docketed, at hearing Complainant clarified that all of violations of the Act being alleged in both complaints were encompassed in the more detailed statement of his complaint dated December 30, 2002.<sup>2</sup> In addition, at hearing, Complainant withdrew paragraph C of the detailed complaint statement [which alleged that the Committee to Elect Rob Fairbank failed to report a contribution from the Fund for Colorado's Future, as required by Section 1-45-108(2.5), C.R.S.] and paragraph G [which alleged that statements made to the press alleging sex harassment and harassment of his wife were in violation of Section 1-45-115, C.R.S.]

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1 The complaints were served on Rob Fairbank as the registered agent for both the Fund for Colorado's Future and the Committee to Elect Rob Fairbank. At hearing it was established after some initial confusion that Rob Fairbank no longer serves as the registered agent for the Committee. Any defect in service on the Committee, however, was impliedly waived by the Committee, which appeared through counsel and raised no issue regarding notice or service.

2 This detailed statement was issued in OS 2002-025 in response to an Order Requiring More Definite Statement of December 12, 2002.

## **PRELIMINARY MATTERS**

At the outset of the hearing, Respondents moved to dismiss the portions of the complaints which allege a failure to comply with Section 1-45-110, C.R.S., which requires candidates for the General Assembly to file certain disclosure statements. In paragraph E of his detailed complaint statement of December 30, 2002, Complainant relies in part on Section 1-45-110 and other requirements referenced by it to assert a violation of the Act.

The Administrative Law Judge's jurisdiction in this proceeding is governed by Section 1-45-111(2)(a), C.R.S., which only allows complaints to be filed asserting violations of certain provisions of the Act. Section 1-45-110 is not listed among these provisions. The Act therefore does not permit Complainant to file a complaint asserting a violation of Section 1-45-110 and does not authorize the Administrative Law Judge to hold a hearing to determine whether such a violation has occurred. That portion of paragraph E relying on Section 1-45-110 was therefore dismissed. Likewise, the Administrative Law Judge has no jurisdiction in a proceeding pursuant to the Act to address the statutory provisions cited in paragraph E pertaining to the Colorado Lottery Commission [Section 24-35-207(6), C.R.S.] and the Colorado Bingo-Raffle Advisory Board [Section 12-9-201(2)(h), C.R.S.].<sup>3</sup>

## **ISSUES PRESENTED**

After the initial dismissal of a portion of paragraph E by the Administrative Law Judge and Complainant's withdrawal of paragraphs C and G of his detailed complaint statement, the following issues remained. These issues were resolved on Respondents' motion at the close of Complainant's case:

1. Did the Fund for Colorado's Future made an independent expenditure of \$15,855.96 to advocate the election of Tambor Williams to the Colorado House of Representatives without complying with the disclosure requirements of Section 1-45-107(1), (2), and (3), C.R.S.?
2. Did the Fund for Colorado's Future made a contribution in excess of \$1,000 to a candidate for the Colorado House of Representatives, *i.e.*, Tambor Williams, in violation of Section 1-45-105.3(d), C.R.S.?
3. Did the Committee to Elect Rob Fairbank and the Fund for Colorado's Future fail to file amendments to the Colorado Secretary of State registration forms reflecting changes of address, purpose or intent, or disclosure of affiliated candidates and committees in violation of Section 1-45-108(3), C.R.S.?

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<sup>3</sup> Complainant's reference to Section 72-60-301(1)(g), C.R.S., does not exist.

4. Did the Committee to Elect Rob Fairbank use Representative Rob Fairbank's official telephone number on campaign literature in violation of Section 1-45-117(3), C.R.S.?

### **FINDINGS OF FACT**

1. Rob Fairbank is a Colorado legislator in the Colorado House of Representatives. He was originally elected in 1998 and is currently serving his third term.

2. Charles W. Carter was Rob Fairbank's opponent in the 2000 in House District 30 and in 2002 in House District 22.

3. The Committee to Elect Rob Fairbank ("Committee") was organized and registered in 1997 with an address on the Secretary of State's Committee Registration Form of 10201 West Ida Ave. #137, Littleton, CO 80127. This Committee address has never changed, and subsequent Committee Registration forms have continued to list the same address.

4. The April 2, 2002 Committee Registration Form for the Committee leaves blank the question: "List all affiliated Candidates and Committees (as applicable)."

5. Sometime between approximately September and the election in early November, 2002, the Committee arranged for the distribution of campaign materials supporting Rob Fairbank's reelection. These campaign materials included Representative Fairbank's telephone number at the State Capitol, as reflected on Attachment 1 to this Agency Decision.

6. The Fund for Colorado's Future ("Fund") is a political committee registered in Colorado with the Secretary of State with an address of 10201 West Ida Avenue #137, Littleton, Colorado 80127. This Committee address has never changed, and no amended address has been filed with the Secretary of State. Rob Fairbank is the sole member and the registered agent of the Fund. The stated purpose of the Fund is to promote social welfare, and the record establishes no change in this purpose.

7. The only registration in the record for the Fund is that of January 3, 2000. As reflected on that registration, the affiliated candidates and committees, as applicable, are Rob Fairbank.

8. On April 22, 2002, the Fund paid GBSM, Inc., an advertising firm, \$15,855.96 for expenses incurred for radio and newspaper advertisements to commend and thank Representative Tambor Williams for her efforts in relation to Senate Bill 141 regarding oil and gas interests. The ads begin with the statement "Thank goodness for Tambor Williams." A copy of the newspaper advertisements is attached as Attachment 2.

9. The record does not establish whether Williams was a candidate for office at the time of the radio and newspaper advertisements referred to in the previous paragraph.

The content of the radio advertisements is not in evidence. The newspaper advertisements do not urge voters to elect or re-elect Williams for any office, do not identify her as a candidate for office, and do not refer to any election.

10. Complainant filed a previous complaint against Rob Fairbank in OS 2000-14, *in the Matter of the Complaint Filed by Charles W. Carter Regarding Alleged Violations of the Fair Campaign Practices Act on the Part of Rob Fairbank*. No hearing was held, and no determination on the merits was made. The parties signed a Stipulation of Dismissal Without Prejudice, which formed the basis for the Order of Dismissal and Agency Action entered on January 18, 2001.

## **DISCUSSION**

Each of the violations identified in the Statement of Issues will be addressed separately:

I. Independent Expenditure by Fund to Advocate Election of Williams. Complainant contends that the Fund made an independent expenditure of \$15,855.96 to GBSM, Inc., to advocate the election of Tambor Williams to the Colorado House of Representatives without complying with the disclosure requirements of Section 1-45-107(1), (2), and (3), C.R.S. This complaint must be dismissed for two reasons. First, it is untimely. Section 1-45-111(2)(a), C.R.S., provides that a person may file a complaint alleging a violation of certain provisions of the Act, including the disclosure requirements of subsection 107, “no later than one hundred eight days after the date of the alleged violation.” Here, the \$15,855.96 payment was made on April 22, 2002, and Complainant filed his first complaint on October 22, 2002, 183 days after the payment.

Second, even had the complaint been timely, the record does not establish a violation of subsection 107. This provision requires persons making independent expenditures in excess of \$1,000 to make certain disclosures. An independent expenditure must be for the “purpose of advocating the election or defeat of a candidate.” Section 1-45-103(7), C.R.S. Although the ads at issue here refer to Williams as a State Representative, they do not identify her as a candidate for any office, refer to any election, or urge voters to take any electoral action, *e.g.*, to vote for Representative Williams. Rather, the content of these communications deals with Representative Williams’ legislative actions in relation to Senate Bill 141 and is summed up in the opening line of “Thank goodness for Tambor Williams.” The payments for these newspaper ads are simply not “for the purpose of advocating the election or defeat of a candidate,” as required in order for the expenditure to meet the definition of an independent expenditure.

II. Contribution by Fund to Advocate Election of Williams. Alternatively, Complainant contends that the Fund’s payment of \$15,855.96 to GBSM, Inc., is a contribution<sup>4</sup> to Tambor Williams in excess of the \$1,000 limit imposed by Section 1-45-

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<sup>4</sup> Although Complainant phrased his complaint alternatively in terms of a contribution or a contribution in kind,

105.3(1)(d), C.R.S. This provision caps contributions from any political committee to a State House of Representative candidate committee to \$1,000. This alternative complaint must also be dismissed for the same two reasons stated above. First, it is untimely pursuant to Section 1-45-111(2)(a), C.R.S., as complaints alleging violations of subsection 105.3 must be filed within 180 days, and it was filed on October 22, 2002, 183 days after the payment.

Second, the \$15,855.96 payment does not meet the definition of a contribution, which refers as applicable here to “any payment made to a third party for the benefit of any candidate committee.” Section 1-45-103(4)(a)(II), C.R.S. As discussed above, the record does not establish that Tambor Williams was a candidate or that the advertisements were for the benefit of her candidacy. In interpreting the language “for the benefit of any candidate committee,” the Administrative Law Judge is cognizant of the First Amendment protection afforded to the discussion of political issues and the concomitant restraints on state regulation of such speech. For these reasons, courts have narrowly construed the Act. *League of Women Voters v. Davidson*, 23 P.3d 1266, 1273-74 (Colo. App. 2001). In defining those communications subject to state regulation, courts have developed an “express advocacy” test, *i.e.*, campaign finance reform legislation can only regulate those communications which in express terms advocate the election or defeat of a clearly identified candidate.” *Buckley v. Valeo*, 424 U.S. 1, 43-44 (1976)(“*Buckley*”),<sup>5</sup> *Federal Election Commission v. Christian Action Network*, 894 F. Supp. 946, 950-951 (W.D. Va. 1995).

In *Buckley*, the Supreme Court differentiated between permissible restrictions on “express advocacy” and impermissible restrictions on “issue advocacy.” The Court gave substance to the “express advocacy” test by stating in a footnote that only those communications which use language such as “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” or “reject” are subject to regulation as express advocacy. *Buckley* at p. 44, fn. 52.<sup>6</sup> The Act is applicable only to communications which expressly advocate the election or defeat of a candidate for public office and use the words contained in the *Buckley* footnote or “other substantially similar or synonymous words.” *League of Women Voters v. Davidson*, *supra* at 1277. Communications which do not include express words advocating the election or defeat of a particular candidate are viewed as issue advocacy, which is protected from regulation by the First Amendment. *Citizens for Responsible Government v. Davidson*, 236 F.3d 1174, 1187 (10th Cir. 2000). The newspaper advertisements at issue do not use any of the words enumerated in the *Buckley* footnote or substantially similar or synonymous words and therefore do not

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the disputed transaction involves the payment of money and is therefore, if anything, a contribution and not a contribution in kind. Sections 1-45-103(4) and (4.5), C.R.S.

<sup>5</sup> Although the *Buckley* decision addressed the Federal Election Campaign Act of 1971, 2 U.S.C. § 431, and dealt with independent expenditures, its reasoning is equally applicable to the matter at hand.

<sup>6</sup> This “bright line” test distinguishes between issue advocacy not subject to campaign finance regulation and express advocacy subject to such regulation. A bright line test is needed due to the inherent difficulty of distinguishing protected speech involving the discussion of political issues from exhortations to vote for or against a candidate. *Federal Election Commission v. Christian Action Network*, *supra* at 950-951.

constitute express advocacy. They therefore are not regulated by the Act.

III. Committee's and Fund's Failures to File Amendments to Committee Registration Forms Reflecting Changes. Complainant charges that both the Fund and the Committee changed their addresses but failed to amend their committee registration forms filed with the Secretary of State to reflect their new addresses. The requirement for candidate committees to register, with a street address reflecting the principal place of operations, is contained in Section 1-45-108(2.5), C.R.S., and Complainant therefore contends that the Administrative Law Judge has jurisdiction to address this complaint, since subsection 108 is one of those referenced in Section 1-45-111(2)(a), C.R.S., authorizing the filing of complaints. Without addressing this contention, however, the Administrative Law Judge notes that the record fails to show any change of address by either the Committee or the Fund since their initial registrations with the Secretary of State, and therefore this complaint is without merit and must be dismissed.

Likewise, in relation to Complainant's contention that the Fund has failed to amend its Committee Registration Form to indicate a change in its purpose or nature of interest in purported violation of Section 1-45-108(3)(e), C.R.S., the record fails to establish that any such change occurred. To the extent that Complainant alleges that the registration form filed by the Committee on April 2, 2002, and by the Fund on January 3, 2000, violate the Act by failing to complete the section "list all affiliated Candidates and Committees (as applicable)" or by completing it inappropriately, any complaint cognizable under the Act is untimely pursuant to Section 1-45-111(2)(a), C.R.S.

IV. Committee's Listing of Representative Fairbank's Capitol Telephone Number on Campaign Literature. Complainant charges that the Committee violated Section 1-45-117(3), C.R.S.,<sup>7</sup> of the Act by printing on Representative Fairbank's campaign literature the telephone number made available to him as a legislator. Complainant compares this to using public property for private gain. The language relied on by Complainant, however, does not reference this principle and does not proscribe the action taken by the Committee here.

V. Sanctions. Respondents have requested an award of costs and attorney fees based on their assertion that the complaints filed in these matters are frivolous and

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<sup>7</sup> Section 1-45-117(3), C.R.S., reads as follows:

If any candidate who is also an incumbent inadvertently or unavoidably makes any expenditure which involves campaign expenses and official expenses, such expenditures shall be deemed a campaign expense only, unless the candidate, not more than ten working days after the such expenditure, files with the appropriate officer such information as the secretary of state may by rule require in order to differentiate between campaign expenses and official expenses. Such information shall be set forth on a form provided by the appropriate officer. In the event that public moneys have been expended for campaign expenses and for official expenses, the candidate shall reimburse the state or political subdivision for the amount of money spent on campaign expenses.

groundless. Respondents relies in part on Section 13-17-101 and 102, C.R.S., but these provisions apply only to courts of record, not to administrative proceedings. Section 13-1-111, C.R.S. [definition of “courts of record”]. Respondents also rely on Section 13-16-107, C.R.S., providing for an award of costs in the event of judgment on a motion to dismiss against a plaintiff, but this provision is also inapplicable in administrative proceedings.

To the extent that Respondents also rely on C.R.C.P. 11, that rule provides that four prerequisites must be met before pleadings may be filed: 1) there must be a reasonable inquiry into the facts and the law; 2) the signer must reasonably believe based on his investigation that the pleading is well grounded in fact; 3) the legal theory asserted must be based on existing legal principles or a good faith argument for modification of existing law; and 4) the pleading must not be filed for the purpose of causing delay, harassment or an increase in the cost of litigation. *Maul v. Shaw*, 843 P.2d 139 (Colo. App. 1992). Respondents claim that Complainant failed to make a reasonable inquiry regarding facts and that his assertions were not warranted by the law. Further, Respondents refer to a previous complaint filed by Complainant in OS 2002-014, which they assert evidences a pattern of filing frivolous and groundless complaints. This prior matter, however, was dismissed based on the agreement of the parties without any finding regarding the merits, and therefore the Administrative Law Judge can draw no conclusion regarding whether the claims asserted were frivolous or groundless.

Complainant’s complaints indeed had no merit. Complainant evidenced little grasp of the requirements of the Act or the relevant judicial interpretations. Nonetheless, his detailed complaint statement did raise alleged violations cognizable under the Act. He therefore asserted a legal theory in relation to those asserted violations which was based on existing legal principles. Complainant’s factual investigation in support of these legal theories was clearly limited, although he did present some evidence in support of the alleged violations. In addition, at least to some extent, it was not clear whether Complainant’s failure of proof reflected limited advocacy skills or the absence of proof. Given these facts and the Act’s allowance of citizen-initiated and citizen-prosecuted complaints, the Administrative Law Judge finds that no sanction is appropriate pursuant to C.R.C.P. 11.

### **CONCLUSIONS OF LAW**

1. The Secretary of State has jurisdiction over complaints filed pursuant to the Fair Campaign Practices Act, Section 1-45-111(2)(a), C.R.S.

2. Complainant has failed to establish that the Fund for Colorado’s Future violated the Fair Campaign Practices Act by making an independent expenditure without complying with the disclosure requirements of Sections 1-45-107(1), (2), or (3) C.R.S.

3. Complainant has failed to establish that the Fund for Colorado’s Future violated the Fair Campaign Practices Act by making a contribution in excess of \$1,000 to a

candidate for the Colorado House of Representatives in violation of Section 1-45-105.3(d), C.R.S.

4. Complainant has failed to establish that the Committee to Elect Rob Fairbank and the Fund for Colorado's Future violated the Fair Campaign Practices Act by failing to file amendments to the Colorado Secretary of State registration forms reflecting changes of address, purpose or intent, or disclosure of affiliated candidates and committees in violation of Section 1-45-108(3), C.R.S.

5. Complainant has failed to establish that the Committee to Elect Rob Fairbank violated the Fair Campaign Practices Act by using Representative Rob Fairbank's official telephone number on campaign literature in violation of Section 1-45-117(3), C.R.S.

6. No sanctions against Complainant in the form of an award of attorney fees and costs is appropriate in this matter pursuant to C.R.C.P. 11.

### **INITIAL DECISION**

It is the Agency Decision that neither the Fund for Colorado's Future nor the Committee to Elect Rob Fairbank violated the Fair Campaign Practices Act and that the complaints in OS 2002-025 and OS 2002-207 are dismissed in their entirety.

### **DONE AND SIGNED**

February 26, 2003

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NANCY CONNICK  
Administrative Law Judge



**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the above **AGENCY DECISION** was placed in the U.S. Mail, postage prepaid, at Denver, Colorado, to:

Charles W. Carter  
11503 W. Tulane Place  
Littleton, CO 80127-1001

Richard Westfall, Esq.  
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and was served by interoffice mail to: William Hobbs, Department of State, 1560 Broadway, Suite 200, Denver, CO 80202, on September \_\_\_\_, 2003.

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Secretary to Administrative Law Judge

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